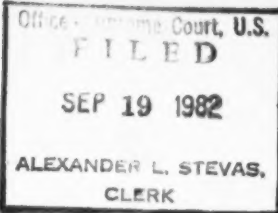


82-5448



No.

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In The  
Supreme Court of the United States

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TIMOTHY WILLIAM UNDERWOOD,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF CALIFORNIA

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I

QUESTIONS PRESENTED FOR REVIEW

I. Whether the appellate courts of the State of California erred by failing to reverse Petitioner's conviction because he was denied his Sixth and Fourteenth Amendment rights by virtue of the fact that the court refused instructions upon a lesser-included offense because it felt that the evidence did not justify the instructions.

II. Whether the appellate courts of the State of California erred by failing to reverse Petitioner's conviction because he was denied his Sixth and Fourteenth Amendment rights by virtue of the fact that the court refused instructions upon a lesser-included offense because it felt that the offense was barred by the statute of limitations.

## II

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Petitioner, Timothy William Underwood, respectfully  
prays that a writ of certiorari issue to review the judgment  
and summary denial of a request for a hearing by the  
Supreme Court of the State of California on April 21, 1982  
following the affirmance of his conviction by an opinion  
of the Court of Appeal of the State of California, Fourth  
Appellate District, Division Two, filed February 5, 1982.

### Opinion Below

Petitioner's request for a hearing before the California Supreme Court was summarily denied with no opinion filed. A copy of the notice of this denial is included herein as Exhibit A. The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, was not certified for publication. A copy of said opinion is included herein as Exhibit B.

### Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1257(3) to review the final judgment of the highest court of a State by writ of certiorari.

### Constitutional Provisions

The following United States Constitutional Provisions are involved: U.S. Const. Amend. VI and XIV. The text of those provisions is attached hereto as Appendix C.

### Proceedings Below

On June 16, 1980, an Information was filed against Petitioner in the Superior Court of the State of California in and for the County of San Bernardino, charging him with murder (Calif. Penal Code Section 187) and alleging that he



used a firearm during the commission of the offense (Calif. Penal Code Section 12022.5). Petitioner entered a plea of not guilty and denied the use allegation. Thereafter several pretrial motions by both sides were heard. On October 21, 1980 Petitioner's jury trial commenced. On October 30, 1980 a defense motion for a judgment of acquittal as to first degree murder was heard and granted. On that same date, a defense motion to instruct the jury on the lesser offense of voluntary manslaughter was heard and denied.

On November 3, 1980 the jury found Petitioner guilty of second degree murder and found that he had used a firearm during the commission of the offense. Petitioner then waived time for sentencing and was sentenced as prescribed by law.

After conviction and sentence Petitioner filed a timely notice of appeal. The matter was briefed and oral argument heard. Because the Court of Appeal could not reach an opinion within the time prescribed by law, the cause was resubmitted on December 31, 1981 "for the purpose of preparing modification of the proposed opinion and the possible preparation of a separate opinion". A copy of said order is attached hereto as Exhibit D.



On February 5, 1982, the Court of Appeal affirmed Petitioner's conviction in an unpublished opinion. A rehearing of said matter was denied on March 5, 1982. On April 21, 1982 the Supreme Court of California denied a hearing.

Petitioner presently remains incarcerated in the custody of the Department of Corrections of the State of California.

#### Statement of the Case

On November 9, 1976 a male body was found wrapped in sheets and in a garbage bag in a shallow grave in the Cajon Pass wilderness area of the County of San Bernardino. The body was not then identified but was labeled "John Doe 15-76". The medical examiner found the cause of death to be a gunshot wound in the base of the skull and concluded that death could have occurred any time between approximately July 10, 1976 and October 15, 1976.

In 1979 the sheets in which the body was wrapped were found to have the same laundry markings as those used by a David Watson, a missing person. Parachute straps tied around the body were also similar to cord found at Watson's last known residence. In 1980, dental chart comparisons by two dentists concluded John Doe 15-76 was David Watson.

From mid-1975 through mid-1976 a young woman named Diana Nelson (also known as Coleen Williams) lived with Petitioner. After their relational disengagement Petitioner moved in with David Watson and Diana moved in with her father. Thereafter, for a period of about one and one-half (1½) months Diana dated David Watson. After that she began dating Petitioner again. Subsequently she dated both men at the same time. This created a rivalry between the two men which led to a cessation of communication between them and attempts by both to turn her against the other man. In August of 1976, Diana stopped dating both men. The theory of the prosecution throughout Petitioner's case was that the "love triangle" between the two men and Diana led Petitioner to kill Watson.

Approximately one to three weeks after Diana Nelson stopped dating both men, Petitioner appeared at her residence driving Watson's van. They went to the residence where Petitioner and Watson lived, but Watson was not present. Ms. Nelson testified at trial that after repeatedly asking Petitioner about Watson's whereabouts, he told her "Dave went bye-bye" and that Watson wouldn't be found for a long

time, didn't know what hit him, didn't feel any pain, and that it was a "crime of passion". Despite the fact that on several previous occasions she had denied any knowledge of the circumstances surrounding Watson's disappearance/death, Nelson revealed the above information to police authorities in September of 1979.

During the course of his trial, Petitioner requested that the jury be instructed as to the lesser-included offense of voluntary manslaughter. However, the trial court refused to do so primarily because it felt that the offense was barred by the statute of limitations (three years under California law). Thereafter, Petitioner was convicted of second-degree murder.

#### Reasons for Granting the Writ

A. THE FAILURE OF THE APPELLATE COURTS OF CALIFORNIA TO REVERSE PETITIONER'S CONVICTION WHERE DEFENSE-REQUESTED INSTRUCTIONS UPON A LESSER-INCLUDED OFFENSE WERE REFUSED IS CONTRARY TO THE PROVISIONS OF THE SIXTH AMENDMENT'S GUARANTEE OF THE RIGHT TO TRIAL BY JURY AND TO THE FOURTEENTH AMENDMENT'S GUARANTEE OF DUE PROCESS.

While the Supreme Court of California chose not to

state its reasons for refusing a hearing in Petitioner's case, it is apparent that it was satisfied with the Court of Appeal's holding that the defense-requested instructions were properly refused as the evidence was insufficient to justify them under the authority of People v. Flannel (1979) 25 Cal.3d 668, 684-85. The Flannel decision, apparently abrogating long-standing California law (see infra), appears to hold that instructions as to lesser-included offenses must be given only when the evidence in support of the lesser offense is "substantial".

Without question the Sixth and Fourteenth Amendments guarantee a defendant the right to trial by jury. Duncan v. Louisiana (1968) 391 U.S. 145. But the right to trial by jury does not merely mean the right to have citizens present in the courtroom. Rather, the guarantee of due process is the right to have the jury adjudicate the facts of a case. Thus, a defendant is entitled to have the jury instructed as to a lesser-included offense which is supported by the evidence. Keeble v. United States (1973) 412 U.S. 205; see also, Beck v. Alabama (1980) 447 U.S. 625. As this Court held in Keeble:

Moreover, it is no answer to Petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

412 U.S. at 212-13. The remaining question then is: what standard should be applied in determining whether the evidence supports instruction upon a lesser offense?

Since the function of the jury is to determine whether the evidence is adequate to find a particular fact, any standard which allows the judge to easily remove consideration of a lesser offense from the jury circumvents the function of the jury and essentially deprives a defendant of his due process right to have the jury adjudicate the facts. Thus, 23 Corpus Juris Secundum explains:



. . . since, . . . the weight and sufficiency of the evidence to establish a fact in issue are a question for the jury, it is generally recognized that any evidence which will authorize the jury to find on it, although in the opinion of the court it may be weak, inconclusive, or unworthy of belief, is sufficient to justify an instruction on the issue raised by such evidence.

at 775-76 (section 1313). To hold that the evidence must be substantial to support instruction upon a lesser offense removes this determination from the jury. Essentially, it makes the court the finder of fact and so deprives a defendant of his right to have the jury make such a determination.

The "substantial evidence" test here applied by the California courts upon the issue of instruction upon lesser included offenses seems inappropriate for a second reason: it shifts the burden of proof to the defendant. Substantial evidence is that evidence which would enable a reasonable jury to find a fact beyond a reasonable doubt. However, a defendant need not prove a lesser degree of an offense beyond a reasonable doubt; he needs only to cast a reasonable doubt about the commission of the greater degree of the offense. As California Supreme Court Chief Justice Bird

explained in her well-reasoned dissent in the Flannel case:

The law is clear that a criminal defendant has a constitutional right to have a jury determine every material issue presented by the evidence. (See People v. Seden, . . . 10 Cal. 3d 703, 720-21 . . .; People v. Modesto (1963) 59 Cal. 2d 722, 730 . . .) Appellant was entitled to the requested diminished capacity instructions under the corollary rule that a trial court "should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever. . . . The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. . . . That is a question within the exclusive province of the jury. However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true." (People v. Carmen (1951) 36 Cal. 2d 768, 773 . . . .

The lead opinion has confused two concepts. Substantial evidence is the standard applied in criminal appeals when a court must decide whether the evidence produced at trial was sufficient to prove the defendant's guilt beyond a reasonable doubt. That is not the issue in this case. Here, the jury must be given the opportunity to consider his defense. The accused need not prove that defense beyond a reasonable doubt but must show there is a reasonable doubt as to his guilt. Clearly, the substantial evidence standard used in considering the validity of a conviction on appeal is totally inappropriate as a standard for determining when an accused is entitled to instructions on a defense of diminished capacity.



The long-standing rule in California has been that a defendant is entitled to an instruction upon a lesser offense if there is any evidence deserving of consideration in support of the instruction. People v. Carmen (1951) 36 Cal. 2d 768, 773; see also, People v. Seden (1974) 10 Ca. 3d 703, 716; People v. Morse (1969) 70 Cal. 2d 711, 732; People v. Miller (1962) 57 Cal. 2d 821, 829; People v. Lewis (1960) 186 Cal. App. 2d 585, 587. To the extent that the Flannel decision abandons this rule in favor of the "substantial evidence" test, it clearly deprives a defendant of his due process right to have the jury adjudicate the facts of his case. However, even in California, the authoritative force of the Flannel decision is unclear. The lead opinion by Justice Tobriner was joined only by Justices Mosk and Newman. 25 Cal. 3d at 686. Thereafter, Justice Mosk favored a rehearing of the matter. Id. at 690.

Analysis of the instant case under the traditional "any evidence deserving of consideration" test reveals that petitioner was entitled to have the jury instructed as to the lesser offense of voluntary manslaughter. The prosecu-

tion in its case in chief presented evidence that there was a "love triangle" between petitioner, David Watson and Diana Nelson. This led to a rivalry between the two men, cessation of communication between the two men, and numerous attempts by each man to turn Diana against the other man. Finally, the prosecution presented evidence that the killing was a "crime of passion". Since the prosecution itself presented this evidence, it should have been bound by it. See People v. Collins (1961) 189 Cal. 2d 575, 591; People v. Coppla (1950) 100 Cal. App. 2d 766, 769. Such evidence was clearly adequate to give rise to some doubt as to whether the crime was murder or manslaughter, thus giving rise to the necessity of instructing the jury as to voluntary manslaughter.

It is also of significance in the instant case that the trial court's ruling occurred before the defense rested. The trial court indicated that it would not give the manslaughter instructions primarily because it felt the offense was barred by the statute of limitations. While the court said that it would allow counsel to present authorities on the issue, it was clear before

the defense rested that the court did not intend to give the requested manslaughter instructions. Faced with this ruling by the court there was little the defense could do. No reasonably competent defense attorney could place his client on the stand to admit the killing but testify as to circumstances which would constitute manslaughter as this would withdraw the only possible remaining defense (i.e., that petitioner was not the killer). Moreover, faced with an admission of the deed the jury would certainly convict the petitioner, even if some doubt appeared in their minds as to the requisite intent. See Keeble v. United States, supra, 412 U.S. at 213. The effect was to deprive petitioner of his right to testify in his own defense.

The cumulative effect of the trial and appellate courts' actions herein has been to deprive petitioner of his due process rights and specifically to deprive him of his right to a trial by jury and to testify in his own behalf. Accordingly, it is submitted that the court's refusal to instruct upon the lesser offense of voluntary manslaughter was reversible error and the

failure of the Supreme Court of California to recognize same should be reviewed by this Court.

B. THE STATUTE OF LIMITATIONS WAS NO BAR TO GIVING THE REQUESTED VOLUNTARY MANSLAUGHTER INSTRUCTIONS.

While the Court of Appeal relied upon the sufficiency of the evidence rationale to reject petitioner's contention that voluntary manslaughter instructions should have been given, the trial court relied primarily upon the statute of limitations in rejecting petitioner's request. Because the filing of criminal charges came more than three years after the offense the court felt the offense was barred by the statute of limitations so it would be improper to instruct the jury upon it.

While the statute of limitations is normally regarded as jurisdictional and so a defense based upon it is not waived by a defendant's failure to raise it at an early stage of the proceedings, there is no reason apparent why a defendant with knowledge of the defense could not waive it. Surely if a defendant can waive such fundamental rights

as the rights to counsel and trial by jury, he can waive the statutory right of a defense based upon the statute of limitations. The analysis in Keeble, supra p. 7-8, seems particularly appropriate here: a defendant might well make a strategic choice to waive the statute of limitations to avoid the jury having to choose between acquittal and conviction of a higher offense where it was clear that some offense had been committed. Failure to allow a defendant to do so again deprives the defendant to his right to have the jury adjudicate the facts and his right to due process.

The facts of the instant case make the above argument particularly compelling. The body of David Watson was discovered in November of 1976. In September of 1979 Diana Nelson, the prosecution's star witness, revealed petitioner's confession to police authorities. Thus, the prosecution had sufficient evidence to charge petitioner within the period of the statute of limitations. However, no charges were filed until 1980 -- precluding, in the trial court's analysis, a finding of voluntary manslaughter. However, petitioner was blameless in this

situation. For whatever reason the prosecution delayed filing against petitioner, he had nothing to do with it. Surely a defendant cannot be deprived of his right to have the jury evaluate the facts of his case merely because the prosecution has delayed filing charges until after the statute of limitations has run as to a lesser-included offense.

In the instant case where the prosecution had sufficient evidence to charge petitioner but delayed filing charges until after the statute of limitations had run on a lesser-included offense, the court's failure to allow the petitioner to waive the statute of limitations clearly deprives petitioner of his Sixth and Fourteenth Amendment rights. Therefore, it is submitted that review by this court is necessary to correct this error.

#### Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for writ of certiorari should be

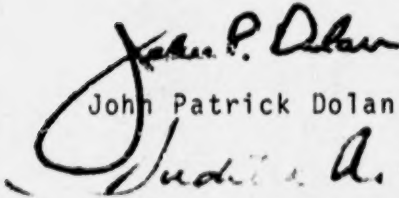


granted.

Dated: June 19, 1982

Respectfully submitted,

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